

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

^B
77-7021

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

(Case No. 77-7021)

ALLEN P. SCHLEIN, M. D.

Plaintiff - Appellant

v.

THE MILFORD HOSPITAL, INC.

Defendant - Appellee

**On Appeal From Decision Of The United States
District Court, District of Connecticut**

BRIEF OF APPELLANT

Attorneys for Allen P. Schlein, M. D.

WILLIAM K. BENNETT

JOHN J. COUGHLIN

BENNETT, KAPUSTA & COUGHLIN

75 Broad Street

Milford, Connecticut

**To be argued by:
John J. Coughlin**

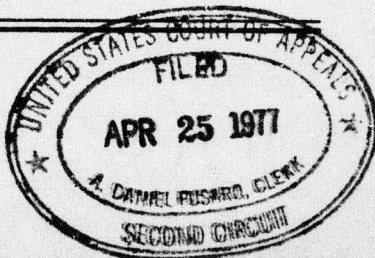


TABLE OF CONTENTS

	Page
Table of Citations	ii
Questions Presented	1
Statement of Facts	1
Arguments	
I The Court erred in granting the defendant's Motion for Summary Judgment	4
II The Court erred in finding that the plaintiff was accorded procedural due process by the defendant in the denial of his application for hospital staff privileges	15
III The Court erred in finding that the decision of the defendant to deny plaintiff hospital staff privileges was not arbitrary, capricious or discriminatory	28
IV The defendant appellee hospital's conduct consti- tutes "State Action" and the court has jurisdiction under Title 42 U.S.C. Sec. 1983	38
Conclusion	48

CITATIONS

Adams v. Greenwich Water Company, 138 Conn. 205 (1951); 83 A. 2d 177	43
Adickes v. Kress & Co., 398 U.S. 144 (1970); 90 S. Ct. 1598; 26 L. Ed. 2d 142	6
Armstrong v. Manzo, 380 U.S. 545 (1965); 14 L. Ed. 2d 62; 85 S. Ct. 1187	20
Bell v. Burson, 402 U.S. 535 (1971); 29 L. Ed. 2d 90; 91 S. Ct. 1586	16, 17
Birnbaum v. Trussell, 371 F. 2d 672 (2nd Circuit, 1966)	18, 29, 41
Board of Regents v. Roth, 408 U.S. 564 (1972); 92 S. Ct. 2701; 33 L. Ed. 2d 548	16, 17, 18, 19, 29, 41
Bricker v. Sceva Speare Memorial Hospital, 339 F. Supp. 234 (D.C. NH, 1973)	46
Burton v. Willmington Parking Authority, 365 U.S. 715; 81 S. Ct. 856; 6 L. Ed. 2d 45 (1961)	39, 40, 44, 46
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); 6 L. Ed. 2d 1230; 81 S. Ct. 1743	20
Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa., 1970)	27, 46
Cypress v. Newport News General & Non-Sectarian Hospital Association, 375 F. 2d 648, (4th Circuit, 1966)	46
Eaton v. Grubbs, 329 F. 2d 710 (4th Circuit, 1964)	43, 44, 46
Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Circuit, 1970)	25
Foster v. Mobile County Hospital Board, 398 F. 2d 227, (5th Circuit, 1968)	19, 41
Goldberg v. Kelly, 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970)	21, 22, 24
Goss v. Lopez, 419 U.S. 565 (1975); 42 L. Ed. 2d 725; 95 S. Ct. 725	16, 18, 41
Grannis v. Ordean, 234 U.S. 385 (1914); 58 L. Ed. 1363; 34 S. Ct. 779	20
Greene v. McElroy, 360 U.S. 474 (1959); 3 L. Ed. 2d 103; 79 S. Ct. 1400	22
Hannah V. Larch, 363 U.S. 420 (1960); 80 S. Ct. 1502; 4 L. Ed. 2d 1307	20
Heyman v. Commerce & Industrial In. Co., 525 F. 2d 1317 (2nd Circuit, 1975)	6
Hoberman v. Lock Haven Hospital, 377 F. Supp. 1178, (1974) (M.D. Pa.)	17, 27

Huntley v. Community School Board of Brooklyn, etc., 543 F. 2d 979 (2nd Circuit, 1976)	18, 19
Jackson v. Metropolitan Edison Co., 419 U.S. 345; 95 S. Ct. 449; 42 L. Ed. 2d 477 (1974)	41
Jackson v. The Statler Foundation, 496 F. 2d 623, (2nd Circuit, 1974); U.S. cert. den.	44, 46
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); 71 S. Ct. 624; 95 L. Ed. 817	20
Judge v. City of Buffalo, 524 F. 2d 1321, (5th Circuit, 1975)	6
Mabey v. Regan, 537 F. 2d 1036 (9th Circuit, 1976)	12, 13, 34
Male v. Crossroads Associates, 469 F. 2d 616 (2nd Circuit, 1972)	43, 44
Martino v. Concord Community Hospital District, 231 Cal. App. 2d 51; 43 Cal. Rptr. 255 (1965)	32
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); 92 S. Ct. 1965; 32 L. Ed. 2d 677	39, 40, 44, 46
Morrissey v. Brewer, 408 U.S. 471 (1972); 33 L. Ed. 2d 484; 92 S. Ct. 2593	20
National Council, etc. v. Subversive Activities Cont. Bd., 322 F. 2d 375 (D.C. Circuit, 1963)	26
Paul v. Davis, 424 U.S. 691 (1976); 96 S. Ct. 1155; reh. den. 96 S. Ct. 2194	18, 19
Pickering v. Board of Education, 391 U.S. 563 (1968); 88 S. Ct. 1731; 20 L. Ed. 2d 811	34
Powe v. Miles, 407 F. 2d 73 (2nd Circuit, 1968)	42
Powell v. Alabama, 287 U.S. 45 (1932); 77 L. Ed. 158; 53 S. Ct. 55	21
Ricucci v. United States, 425 F. 2d 1252 (Ct. Claims, 1970)	26
Rosner v. Eden Township Hospital District, 58 Cal. 2d 592; 25 Cal. Rptr. 551; 375 P. 2d 431 (1962)	30, 32, 34
Sams v. Ohio Valley General Hospital Association, 413 F. 2d 826, (4th Circuit, 1969)	44, 45, 46
Schlein v. The Milford Hospital, Inc., 383 F. Supp. 1263 (1974); 423 F. Supp. 541 (D. Conn., 1976)	16, 39
Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); 77 S. Ct. 752; 1 L. Ed. 2d 796	17, 24, 29, 38
Sherbert v. Berner, 371 U.S. 938 (1963); 9 L. Ed. 2d 273; 83 S. Ct. 321	17

Silver v. Castle Memorial Hospital, 497 P. 2d 564 (dissent, p. 573) (1972)	37
Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4th Circuit, 1963)	44, 45, 46
Singleton v. Gendason, 545 F. 2d 1224 (9th Circuit, 1976)	6
Slochow v. Board of Education, 350 U.S. 551 (1956); 76 S. Ct. 637; 100 L. Ed. 692	28
Sussman v. Overlook Hospital Association, 92 N. J. Super 163 (1966); 222 A. 2d 530	9
Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (9th Circuit, 1975); aff'd 523 F. 2d 75; cert. den. 424 U.S. 948; 47 L. Ed. 2d 355	46
Thomas v. Ward, 374 F. Supp. 206 (M.D. N.C., 1973); mod. 529 F. 2d 916 (4th Circuit, 1975)	26
United States v. Bosurgi, 330 F. 2d 1105 (2nd Circuit, 1976)	6
Willner v. Committee of Character & Fitness, 373 U.S. 96 (1963); 83 S. Ct. 1175; 10 L. Ed. 2d 224	17, 21, 24, 25
Williams v. McAllister Bros., Inc., 534 F. 2d 19 (2nd Circuit, 1976)	10
Wisconsin v. Constantineau, 400 U.S. 433 (1973); 27 L. Ed. 2d 515; 91 S. Ct. 507	18
Woodbury v. McKinnon, 447 F. 2d 839 (5th Circuit, 1971)	29
Wyatt v. Tahoe Forest Hospital District, 174 Cal. App. 2d 709; 345 P. 2d 93 (1959)	19, 32

Statutes Cited

Connecticut General Statutes:

§19-13(d) 2-12	16, 40, 41
§19-33, et seq	40
§19-36	40
§19-73a et seq.	40, 42, 43
§19-276, et seq	40
§19-576, et seq	40
§19-578	40
§20-8, et seq	1, 40
Title 28, U. S. C. :	
§1331	3
§1343	3, 39
Title 42, U. S. C. :	
§291, et seq	44
§1983	1, 3, 39
§1985	3, 39
Pub. L. No. 92-603, Title II, Sec. 249 F.B., 86 Stat. 1437	45
F.R. C.P. 56	5
F.R.C.P. 56 (c)	4

United States Constitution

First Amendment	32, 34, 38
Sixth Amendment	22
Fourteenth Amendment	1, 3, 10, 11, 13, 16, 17, 19, 20, 21 23, 24, 26, 27, 28, 29, 32, 34, 38, 39, 44, 46, 47

Authorities Cited

J. Moore & P. Lucas, Moore's Federal Practice, Section 56.17(10) (1976)	11
---	----

QUESTIONS PRESENTED

ARGUMENT 1: The Court erred in granting the defendant's Motion for Summary Judgment.

ARGUMENT 2: The Court erred in finding that the plaintiff was accorded procedural due process by the defendant in the denial of his application for hospital staff privileges.

ARGUMENT 3: The Court erred in finding that the decision of the defendant to deny plaintiff hospital staff privileges was not arbitrary, capricious or discriminatory.

ARGUMENT 4: The defendant appellee hospital's conduct constitutes "State Action" and the Court has jurisdiction under Title 42 U.S.C. Sec. 1983.

FACTS

The plaintiff-appellant, Allen P. Schlein, M.D., is an orthopedic physician licensed to practice medicine by the State of Connecticut pursuant to *Conn. Gen. Stat. Sec. 20-8 et seq.* The plaintiff graduated from Jefferson Medical College in 1965 and served his internship at Philadelphia General Hospital. He completed a four year residency in orthopedic surgery at the Mayo Clinic Foundation, Rochester, Minnesota. Thereafter, he was associated with the Strauss Surgical Group and held hospital staff privileges at Weiss Memorial Hospital, both in Chicago, Illinois. *J.A. p. 1, 2, 11, 12, 13 While in Chicago, he taught at the University of Illinois Medical School and was associated with Robert

* J.A. designates Joint Appendix

Ray, M.D., who had an international reputation as an orthopedic surgeon. The plaintiff is a fellow of the American Board of Orthopedic Surgeons and has written and published extensively in recognized orthopedic journals. J.A. p. 12, 13.

The plaintiff has designed and holds a patent for a total elbow replacement and has been innovative in establishing orthopedic surgical procedures for the total elbow replacement. J.A. p. 2, 12, 13.

In June 1972 after leaving Chicago, plaintiff became associated with William Lewis, M.D. of Bridgeport, Connecticut in the practice of orthopedic surgery. At all times herein, the plaintiff held hospital staff privileges at Park City Hospital, St. Vincent's Hospital and Bridgeport Hospital within that city. J.A. p. 1.

The defendant-appellee, The Milford Hospital, Inc., is a non-profit, tax-exempt corporation, licensed by the State of Connecticut and is the exclusive and only short-term licensed hospital within the City of Milford. The defendant hospital receives federal funds and is subject to various federal and state regulations. J.A. p. 25, 88, 89, 90.

The plaintiff maintains an office for the practice of orthopedic medicine in the City of Milford, at 75 New Haven Avenue. He applied for hospital staff privileges at the defendant as it is the only state licensed short-term hospital within that city where he could admit patients in connection with the practice of his profession. Plaintiff's application for hospital staff privileges was filed on June 7, 1973 and was bounced from committee to committee like a yoyo. At one point, he was informed his application had been approved and

the next day, the recommendation approving privileges was withdrawn. After the application was passed back and forth between Credentials Committee, Executive Committee and the Medical Staff, he was advised of the denial of his application for hospital staff privileges by letter dated December 7, 1973. J.A. p. 331. The plaintiff appealed his denial for privileges. The defendant assigned four reasons, involving clinical competence, reputation, ability to work with others and abrasive behavior as the basis for the rejection. The plaintiff requested an Ad Hoc hearing and Appellate Review, pursuant to the By-Laws of the defendant, which was held. The plaintiff requested the right to have benefit of counsel at the Ad Hoc hearing, which was denied. The Ad Hoc hearing and Appellate Review did not reverse the denial of his application for privileges. Plaintiff commenced this action for injunctive and monetary relief alleging a violation of his rights under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 1983, and 1985 asserting jurisdiction under 28 U.S.C. Sec. 1331 and 1343.

The defendant hospital moved to dismiss on the grounds that the Court did not have subject matter jurisdiction. The Court denied the Motion to Dismiss, finding "state action." Subsequently, the defendant filed a Motion for Summary Judgment raising three issues: (1) Whether the hospital's activities are state action to which the Fourteenth Amendment limitations apply; (2) Whether the hospital's denial of staff privileges to plaintiff violated procedural due process standards; and (3) Whether the hospital's decision was arbitrary and capricious as a matter of substantive due process. The Court, Newman J., held that the hospital's activities constituted state action to which

the Fourteenth Amendment limitations apply and granted the summary judgment on the remaining two grounds of the Motion for Summary Judgment. From the granting of the summary judgment, the plaintiff filed this appeal. The defendant filed a cross appeal on the issue of jurisdiction.

ARGUMENT I

THE COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant Milford Hospital moved for summary judgment pursuant to *F.R.C.P. 56 (c)* which was granted. The Court, in granting the defendant's Motion for Summary Judgment, held that the defendant hospital's denial of staff privileges to the plaintiff-physician did not violate procedural due process standards and its decision was not arbitrary and capricious as a matter of substantive due process. The plaintiff appealed this decision.

The defendant, in moving for summary judgment, included all records of proceedings before the defendant hospital, all affidavits on file in support of the defendant's Motion to Dismiss, and its Motion for Summary Judgment, affidavits of the plaintiff for temporary injunction, and the depositions taken by plaintiff of Michael Gavin, a physical therapist who testified before the Credentials Committee on June 22, 1973; Nicholas Coassin, M.D., a member of the Credentials Committee and the Medical Staff; Peter Naiman, M.D., a witness before the Credentials Committee on June 22, 1973 and a member of the Ad Hoc Committee; Robert Kerin, M.D., chairman of the

Credentials Committee and petitioner's representative (prosecutor) at the Ad Hoc hearing; Daniel A. Johnson, Chairman of the Executive Committee of the Board of Directors of the defendant; Fred Warren, a member of the Board of Directors and President of the defendant; George R. Plaskowitz, Administrator of the defendant; Irwin Siegal, M.D., an orthopedic surgeon from Chicago, Illinois, who employed the plaintiff-physician previously; Walter T. Shanley, M.D., an orthopedic surgeon in Bridgeport; Asok Ray, M.D., an orthopedic surgeon from Chicago, Illinois who was associated with the plaintiff at the Weiss Memorial Hospital; John Elstrom, M.D., an orthopedic surgeon from Chicago, Illinois, who was previously associated with the plaintiff at Mayo Clinic; Earl E. Vanderwerker, M.D., a staff member of the defendant; Anthony Sterling, M.D., an orthopedic physician associated with the plaintiff after his application for hospital staff privileges had been denied.

The plaintiff filed three affidavits in opposition to defendant's Motion for Summary Judgment. J.A. p. 111-166. The records of the defendant hospital, the depositions and all affidavits on file raised genuine issues as to material fact and the granting of the motion was inappropriate.

"Summary judgment is a drastic remedy to be granted only where the requirements of *Rule 56 F.R.C.P.* have been clearly met. A motion for such a judgment does not entitle the Court to try issues of fact. Its function is limited to deciding whether there are any such issues to be tried. In making that determination, 'it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought with the

burden on the moving party to demonstrate the absence of any material, factual issue in dispute.'"
United States vs. Bosurgi 530 F.2d 1105, 1110 (2nd Cir. 1976); *Heyman vs. Commerce and Industry Insurance Company* 524 F.2d 1316, at 1320 (2nd Cir. 1975); *Judge vs. City of Buffalo*, 524 F.2d 1321 (2nd Cir. 1975). See *Adickes vs. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). It is axiomatic that summary judgment is proper only when the movant has proved that there is no genuine issue as to any material fact. *Singleton vs. Gendason* 545 F.2d 1224, 1226 (9th Cir. 1976). The defendant failed to sustain its burden that a genuine issue did not exist as to any material fact entitling defendant to summary judgment.

The reason why the plaintiff was denied hospital staff privileges has remained a controverted issue of fact. The defendant notified the plaintiff by letter dated December 28, 1973 that his application for hospital staff privileges was being denied for the following reasons: J.A. p. 340, 341.

1. That the evaluations of your recent clinical experience received from Chiefs of Orthopaedic Surgery at the Park City Hospital and St. Vincent's Hospital were essentially negative with respect to your professional reputation and ability to work well with others.
2. That the evaluation of your professional conduct in current and past hospital associations has developed a substantial record that your behavior in the performance of your professional duties demonstrated a difficulty in working well with patients, as well as with other members of the various medical staffs on which you served.

3. That your inability to obtain an affirmative recommendation with respect to your professional competence from the Chiefs of Orthopaedic Surgery at two local hospitals, together with the pattern of abrasive behavior with respect to fellow staff members at other hospitals, as well as other facts developed in the record, raised substantial doubts that you possessed the demonstrated competence, good reputation and ability to work well with others so as to insure a high quality of care to patients at Milford Hospital.
4. And finally, such other facts which will appear in the record failed to demonstrate to the Medical Staff that the approval of your application for privileges would be in the best interests of the health needs of the Milford community.

During the long course of the pleadings, depositions, admissions of fact, reply to interrogatories, and statements in the record, the four reasons assigned were abandoned and reduced to "his inability to work well with others". J.A. p. 109, 110, 267. It was not until depositions were taken, motive of the participants explored and underlying facts relied upon by the defendant questioned that the assigned reasons were placed on shifting sands of convenience by the defendant. The record discloses that the issue of alleged "inability to work well with others" is non-existent and is nothing more than a subterfuge to mask other reasons without validity of substance to deny plaintiff hospital staff privileges. There is an issue of fact as to what the real reason for the denial was as opposed to the reasons advanced. The chairman of the Credentials Committee, Robert Kerin, M.D. and Peter

Naiman, M.D. a member of the Ad Hoc Committee, are partners in orthopedic surgery and the only orthopedic surgeons having full active privileges at the defendant hospital.' J.A. p. 209, 210. The entire proceedings before the hospital were orchestrated by Dr. Kerin who had a vested interest in protecting his monopoly. Most illuminating is Dr. Kerin's telephone conversation with Walter Shanley, M.D. supposedly attempting to obtain a positive letter of recommendation which is as follows:

Well, he (Dr. Kerin) gave me a little background on Dr. William Lewis, his associate, who had applied over at Milford Hospital previously and apparently had gotten some temporary privileges there, which were revoked. And now he told me how Dr. Schlein, his associate, was trying to get privileges.

He did tell me that they had opened an office up in Milford, and he did tell me that there was some dissatisfaction with the staff and himself concerning these two doctors, and they were concerned about exactly what they wanted from Milford Hospital and what they intended to do there. And he asked me if I would recommend him to their staff.

. Now, Dr. Schlein is an associate of Dr. Lewis. They are within the same professional corporation. Dr. Schlein essentially represents Dr. Lewis' corporation and his own, as one corporation, Bridgeport —, no, it's Orthopedic Associates, P.C., and I think he was concerned that one would represent the other. And as he put it, "We're dissatisfied with Dr. Lewis. I think Dr. Lewis is trying

to sneak in the back door of Milford Hospital by putting up Dr. Schlein. J.A. p. 222, 223 (emphasis supplied)

The issue as to whether professional jealousy, personal dislikes or other facts having no relevancy to the issue of plaintiff's fitness for hospital staff privileges, is an issue of fact. See *Sussman vs. Overlook Hospital Ass'n* 92 N.J. Super.222 A.2d 530. It is evident that the reasons for the denial, in and of itself, are a question of fact to be determined by the Court. The plaintiff denied he was unable to get along with physicians or hospital staff personnel throughout his medical career and, in fact, asserted the opposite was true. The objective fact is that Dr. Schlein has had good working relationships with other physicians and hospital staff personnel including nurses and administrators, which make up the team of a hospital. J.A. p. 117, 206, 207, 229, 230, 243-249, 251-259, 306, 322, 334, 336, 337, 342, 354, 364, 383. He testified at the Ad Hoc hearing and the Appellate Review hearing before the Executive Board of the Milford Hospital of his ability to work well with others.

As positive evidence of his ability to work well with others and to buttress his own testimony before the Ad Hoc hearing and the Appellate Review, he introduced letters from hospital administrators, physicians and nurses attesting to his ability to work harmoniously with hospital staff members, and attesting to competency and good physician-patient relationship. Depositions were taken of Asok Ray, M.D., John Elstrom, M.D., and Irwin Siegal, M.D., who worked with Dr. Schlein throughout his medical career commencing with the Mayo Clinic, Strauss Medical Group and Weiss Memorial Hospital for the purposes of establishing that any allegations of inability to work

well with others was untrue. J.A. p. 117, 206, 207, 229, 230, 243-249, 251-259, 306, 322, 335, 336, 337, 342, 354, 364, 383. An issue of fact arises as to motivation, scope of the procedures before the hospital and the actual factual basis upon which his privileges were ultimately denied. Daniel Johnson, Chairman of the Executive Committee who sat on the Appellate Review body testified as follows:

"Finally, we followed the recommendation, because after that period of time, it became quite clear that for whatever basic reasons, I don't know what it was, that Dr. Schlein unfortunately was unacceptable to this group. So in searching my own mind, I have nothing personal against Dr. Schlein at all." Transcript, Daniel Johnson, page 40. J.A. p. 278, 280, 284.

The trial of this matter should not be by affidavit. The curtains of a trial should not be closed on the grave issues presented in the plaintiff's complaint.

The District Court, in ruling on the Motion for Summary Judgment, was not charged with the task of resolving issues of fact but merely the task of determining whether any material factual issues existed. In doing so, the Court must resolve all ambiguities and reasonable inferences in favor of the party against whom the summary judgment is sought. *Williams vs. McAllister Bros., Inc.* 534 F.2d 19, 21 (2nd Cir. 1976). The plaintiff, in his complaint, alleges that he was denied: due process within the meaning of the Fourteenth Amendment; the right of cross examination; the right of confrontation; the right of counsel; that the defendant violated its own By-Laws in the processing of his application; that his privileges were

denied on the basis of ex-parte hearsay statements and that his privileges were denied in an arbitrary and capricious manner. These issues, denied by the defendant, constitute genuine issues of material fact which were determined by the trial court on the basis of affidavits. These issues are facts which require trial and were inappropriately disposed of by summary judgment. Summary disposition is inappropriate for constitutional questions. 6 J. Moore & P. Lucas, *Moore's Federal Practice*, Section 56.17 (10) 1976.

The plaintiff's application for hospital staff privileges was processed pursuant to the Medical Staff By-Laws, Article VIII, et seq. J.A. p. 403-416. The plaintiff alleges that he was denied the procedural rights afforded by the By-Laws and by the Fourteenth Amendment of the United States Constitution. The Medical Staff By-Laws of the defendant provide the right of cross examination and confrontation. The By-Laws also require that the Executive Committee appoint one of its members or some other medical staff to support the "facts" in support of its adverse recommendation and to examine witnesses. Such representative is required to present appropriate evidence in support of the adverse decision. The plaintiff alleges this was not done and the procedural safeguards of the By-Laws were not afforded him. The plaintiff was denied this. An issue of fact existed. See *Medical Staff By-Laws Article VIII, Section 5*. J.A. p. 412. The interpretation of the By-Laws and the procedural rights afforded the plaintiff thereunder constitute genuine issues of material facts which are in dispute. The District Court, in granting the defendant's Motion for Summary Judgment, resolved these issues. The defendant hospital's Medical Staff By-Laws dictated procedures to be followed in acting

on the plaintiff's application for privileges and it was bound to follow them. See *Mabey vs. Regan* 537 F.2d 1036, 1042 (9th Cir. 1977)

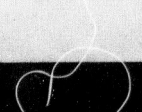
The plaintiff's affidavits and the depositions raised the issue as to bias and motivation. The record of the proceedings before the defendant hospital and certain depositions raised the issue of whether the plaintiff was denied privileges for the reasons stated or because of his association with William Lewis, M.D., his partner. The Credentials Committee meeting of June 22, 1973 stated:

"The application of Dr. Schlein was considered and the committee felt that since the personality of Dr. Lewis required further investigation and definition and Dr. Schlein is associated with him, it would accord Dr. Schlein the same scrutiny."
J.A. p. 302.

The minutes of the special meeting of the Medical Staff of December 26, 1973 of the defendant states:

"A question was raised from the floor about the advisability of including in the formulation Dr. Schlein's association with the practitioner whose professional status has been under question."
J.A. p. 339.

The testimony of Walter Shanley, M.D. concerning his telephone conversation with Robert Kerin, Chairman of the Credentials Committee in November 1973 amplifies the issue of association as the real reason for denying the plaintiff's privileges. Excerpts from the telephone conversation have been set forth previously. J.A. p. 222, 223. Appellant's Brief, p. 8, 9.



The motive and the real reason for plaintiff's denial of hospital staff privileges became a predominant inquiry which included the relationship of certain members of the Credentials Committee, e.g., Robert Kerin, M.D., Chairman of the Credentials Committee and his partner, Peter Naiman, M.D., who had a monopoly in the orthopedic practice in the City of Milford and at the defendant hospital. J.A. p. 209, 210. The question is why would Dr. Kerin state to Dr. Shanley that Dr. Lewis had his privileges revoked when in fact, Dr. Lewis had just applied for privileges with Dr. Schlein on June 7, 1973 raises serious question as to motivation on the part of Dr. Kerin. See minutes of Credentials Committee, June 22, 1973, when Dr. Kerin's partner appeared and testified on the application of Dr. Lewis. J.A. p. 302. There is serious danger that denial of hospital staff privileges on the grounds of "inability to work harmoniously with others" is so ambiguous and vague that it is open to subterfuge. Motive is a primary question in the instant case and cannot be dealt with by summary judgment. The potential for subterfuge exacerbates the dilemma faced by the plaintiff. Although motivational analysis can be slippery, the only way to erect adequate barriers protecting the plaintiff's Fourteenth Amendment rights, property and liberty, was for the trier to determine motivation. Summary judgment is inappropriate when motive is predominant in the inquiry. See *Mabey vs. Regan supra* 1045.

There existed genuine issues of material facts which included motivation; the conflict of testimony of the various deponents as to the reasons for the denial of the plaintiff's application; the motive and pivotal role played by Dr. Kerin who shared a monopoly with Dr. Naiman in orthopedic surgery at Milford Hospital; the interpretation and the rights of the plaintiff secured

by the Medical Staff By-Laws of the defendant; the extent to which Dr. Schlein's association with Dr. Lewis played in his denial; the absence of creditable evidence before the defendant; the conflict of interest that existed by virtue of Dr. Kerin's prosecuting for the Medical Staff at the Ad Hoc hearing and his partner, Dr. Naiman, who sat in a quasi-judicial capacity at the Ad Hoc hearing; and finally, the extent that the plaintiff was denied due process.

The foregoing issues of fact were summarily determined by the Court below and trial was by affidavit. In granting summary judgment, the Court tried issues of fact rather than determining whether issues of fact existed, at all.

The Court, in ruling on the defendant's Motion for Summary Judgment, recognized that a more extensive factual inquiry was required to determine the extent and scope of plaintiff's rights which, in turn, would determine the extent of due process to which he was entitled.

The Court, in its footnote to the decision stated, "Without any further demonstration of possible employment opportunities that have been foreclosed to Dr. Schlein since the hospital's rejection of his application, it is impossible to know whether the alleged stigma attaching to his rejection has resulted in a genuine deprivation of liberty," J.A. p. 173. The Court further noted, "to decide this case on the basis of whether plaintiff's arguably protected interests are indeed at stake would require a more extensive factual inquiry than has been conducted so far in this litigation." J.A. p. 173.

The Court's own observations argue against the

appropriateness of the granting of summary judgment. One of the paramount issues presented in controversy between the parties was whether the action of the defendant in denying privileges was arbitrary and capricious. The bizzare position of the defendant as to a letter from Anthony Camarda, M.D. which was allegedly used as a basis for the denial supports the fact that the denial was arbitrary. The hospital record indicates the letter could not be relied upon as a result of a meeting of November 23, 1973. J.A. p. 324. It abandoned the use of this letter as a reason for denial as testified to in depositions. J.A. p. 216, 265, 266. It is revisited in the affidavit in support of the Motion for Summary Judgment. It used a further ex-parte letter from Walter Shanley, M.D. which was subsequently retracted, at which time it was abandoned as a reason. J.A. p. 109, 325, 356. The foregoing, taken with the testimony of the Chairman of the Executive Committee, Daniel Johnson, that he knew of no facts upon which the denial was based clearly points up that the decision to deny staff privileges was arbitrary and capricious. J.A. p. 282, 284.

A fundamental question of fact, unresolved, is, "was the plaintiff denied privileges in an arbitrary and capricious manner?" For the reasons stated herein, the granting of the defendant's Motion for Summary Judgment was inappropriate and denied the plaintiff the right to a trial on the issues.

ARGUMENT II

THE COURT ERRED IN FINDING THAT THE PLAINTIFF WAS ACCORDED PROCEDURAL DUE PROCESS BY THE DEFENDANT IN THE DENIAL OF HIS APPLICATION FOR HOSPITAL STAFF PRIVILEGES.

The plaintiff, Allen P. Schlein, M.D., is an orthopedic surgeon, licensed by the State of Connecticut, authorized to practice medicine therein. The lower Court found, in denying the defendant's Motion to Dismiss, that state-authorized power, e.g., the state license of the defendant, is being used to determine the scope of the plaintiff's state-created rights. See *Schlein vs. Milford Hospital*, 383 F. Supp. 1263 (1974). J.A. p. 57. The Court held a "private entity cannot play such a pivotal role in the implementation of the state's regulatory authority without abiding by the procedural limitations that the Fourteenth Amendment imposes upon state action." The Fourteenth Amendment forbids the state to deprive any person of life, liberty or property without due process of law. Protected interests and property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizens to certain benefits. *Board of Regents vs. Roth* 408 U.S. 564, 577 (1972); *Goss vs. Lopez* 419 U.S. 565, 573. The plaintiff has a "property interest" in his state license of medicine and orthopedic surgery, which is protected by the Fourteenth Amendment. He also has a "liberty right" to pursue his chosen occupation. The State of Connecticut Public Health Code requires the defendant to establish procedures for recommending appointment to the medical staff. *Connecticut Public Health Code Section 19-13 (d) (c)*.

Once licenses are issued, their continued possession may become essential in the pursuit of a livelihood. Licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Bell vs. Burson* 402 U.S. 535, 539. This

is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege". *Bell vs. Burson*, *supra*; *Sherbert vs. Berner* 372 U.S. 398 (1963). A state, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravenes . . . due process." *Schwartz vs. Board of Bar Examiners*, 353 U.S. 232, 238 (1957) and, specifically, in a manner that denies the right to a full prior hearing. *Willner vs. Committee on Character & Fitness* 373 U.S. 96, 103 (1963). To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it, he must, instead, have a legitimate claim of entitlement to it. *Board of Regents vs. Roth*, *supra* 564, 577. The plaintiff had a legitimate claim of entitlement to his state medical license and/or rights attendant thereto. The defendant, as its acts constitute the acts of the State, is constrained to recognize the plaintiff's legitimate entitlement to practice his profession of orthopedic surgery pursuant to a state medical license as a property interest, which is protected by the due process clause. "The acts of the defendant, in denying hospital staff privileges deprived plaintiff of an interest in "liberty" which is protected by the Fourteenth Amendment by state action without due process. . . . The concept of "liberty" within the meaning of the Fourteenth Amendment includes charges against the person that might seriously damage his standing and association in his community." *Hoberman vs. Lock Haven Hospital*, 377 F. Supp. 1178, 1185 (1974).

The due process clause forbids arbitrary depriva-

tion of liberty as occurred herein. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the clause must be satisfied. *Wisconsin vs. Constantineau*, 400 U.S. 433, 437 (1973); *Board of Regents vs. Roth*, *supra*, 573; *Goss vs. Lopez*, *supra*, 575; *Paul vs. Davis* 96 S. Ct. 1155, 1165, dissent 1172; *Huntley vs. Community School Board of Brooklyn, etc.* 543 F.2d 979, 985, (2nd Cir. 1976). The denial of plaintiff's application for hospital staff privileges and the four reasons advanced therefore, seriously damaged the plaintiff's professional standing and reputation. See *Board of Regents vs. Roth*, *supra* 573; *Birnbaum vs. Trussell* 371 F.2d 672 (2nd Cir. 1966). In the present case, there is not a mere suggestion but the outright charge that the plaintiff's "good name, reputation, honor, integrity and competence" as a physician and surgeon were not sufficient to entitle him to privileges. The stigma imposed upon him by the acts of the defendant foreclosed his "liberty right" to practice his profession, limited future employment opportunities and adversely affected his "property right" in his state and medical license. Would anyone engage a physician in surgery whose competence and professional reputation have been declared insufficient to hold hospital staff privileges? Would other Milford physicians refer their patients for consultation and treatment to the plaintiff who has been denied privileges at the only hospital in the city? The plaintiff, by reason of being denied staff privileges, is restrained in his medical practice. Plaintiff, if he is to fully practice his profession of orthopedic surgery, is being denied access to an essential facility necessary to utilize his license and treat his patients. To the extent that plaintiff's Milford patients require treatment at a hospital, the

denial of staff privileges at the only licensed hospital in the area limits the geographic scope of his physician's license. *Foster vs. Mobile County Hospital Board* 398 F.2d 227 (5th Cir. 1968). "It is common knowledge that a physician or surgeon who is not permitted to practice his profession in a hospital, is, as a practical matter, denied the right to fully practice his profession. In this day of advanced medical knowledge and advanced diagnostic techniques, much of what a physician or surgeon must do can only be performed in a hospital. *Foster vs. Mobile County Hospital Board supra* citing *Wyatt vs. Tahoe Forest Hospital District* 174 Cal. App. 2nd 709, 345, P. 2nd 93, 97.

The reasons the defendant cited for denying plaintiff's application for hospital staff privileges in its letter of December 28, 1973 reflected adversely upon his professional competence, professional ability and reputation.

The reasons assigned for the denial have become a permanent part of the plaintiff's record at the defendant hospital and have been made a matter of record to all members of the medical staff. J.A. p. 294, 295, 339 deposition George Plaskowitz, Hospital Administrator, J.A. p. 102-106.

As this Court said in *Huntley vs. Community School Board of Brooklyn, etc. supra* 985, "The Supreme Court in *Davis* again made it clear, as it did in *Roth*, that the protections of the Fourteenth Amendment are available whenever the state, in terminating an individual's employment, makes charges against him that will seriously impair his ability to take advantage of other employment opportunities." The de-

fendant in denying the plaintiff's application for hospital staff privileges imposed on the plaintiff a stigma or other disability that foreclosed his freedom to pursue his "property rights" and "liberty interests" in his occupation.

"Once it is determined that due process applies, as the lower Court found, the question remains what process is due?" *Morrissey vs. Brewer* 408 U.S. 471, 481 (1972). The extent to which procedural due process must be afforded is influenced by the extent to which he may be "condemned to suffer grievous loss." *Joint Anti-Facist Refugee Committee vs. Mc Grath* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon the interests involved. Procedural due process must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action. See *Cafeteria & Restaurant Workers Union vs. McElroy* 367 U.S. 886, 895 (1961); See *Hannah vs. Larch* 363 U.S. 420, 440, 442, (1960). The plaintiff's interest in his license to practice medicine, his interest in his professional reputation, his "liberty right" to pursue his occupation and his right not to be foreclosed from future opportunities are not de minimus but grievous. The full procedural safeguards of the Fourteenth Amendment must be accorded plaintiff before such a grievous injury is inflicted upon him.

"The fundamental requisite of due process of law is to be heard." *Grannis vs. Ordean* 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong vs. Manzo* 380 U.S. 545, 552. In the context of the

plaintiff's application, the plaintiff was entitled to timely and adequate notice detailing the reasons for the denial of his privileges and an effective opportunity to defend by confronting any adverse witness. See *Goldberg vs. Kelly* 397 U.S. *supra* 268.

The plaintiff challenged the reasons for his denial. The hearsay information and ex-parte statements utilized by the hospital to deny the plaintiff privileges were denied by the plaintiff. J.A. p. 365-382, 392, 395, 396, 398, 399. A distinct factual issue arose. Credibility, veracity and the underlying motivation of the writer were brought in issue by the plaintiff. Procedural due process within the meaning of the Fourteenth Amendment required the right of confrontation and cross examination which were expressly denied the plaintiff. The Court, in *Goldberg*, said at 269;

"Where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision . . .

. . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., *ICC vs. Louisville & N. R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner vs. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963) (emphasis supplied)

The Court, in *Goldberg*, also found that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Citing *Powell vs. Alabama*, 287 U.S. 45, 68-69 (1932).

The Supreme Court in *Greene vs. McElroy*, 360 U.S. 474, 496-497 (1959), said the following which is particularly pertinent to the instant matter:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative . . . actions were under scrutiny." (emphasis supplied)

The By-Laws of the defendant's Medical Staff implicitly recognized the plaintiff's right to an opportunity to be heard; a meaningful hearing in a meaningful manner; the opportunity for confrontation and cross examination, consistent with the principals enunciated in *Goldberg* and *Greene*. J.A. p. 409-414.

Notwithstanding the defendant's By-Laws implicitly providing for such rights, the hearing afforded the plaintiff by the defendant was constitutionally in-

sufficient. The plaintiff requested the specific facts and reasons which resulted in the adverse recommendation denying his application for hospital staff privileges and in response thereto, the defendant set forth four reasons which failed to contain specifics or the underlying facts. The evidence used to deny his privileges was not disclosed until the Ad-Hoc hearing was in progress. J.A. p. 14-16, 389-390. The notice given to plaintiff was constitutionally insufficient and inadequate.

The defendant held an Ad Hoc hearing at the plaintiff's request. The defendant's By-Laws require the Executive Committee or Medical Staff to present the facts in support of its adverse recommendation and to examine witnesses and further, to present appropriate evidence in support of the adverse recommendation. The defendant failed to do so but presented ex-parte hearsay statements which were not shown nor disclosed to the plaintiff until the time of the hearing, except for a letter from Anthony Camarda, M.D. J.A. p. 14-16, 115, 389-390. The defendant violated its own By-Laws and also the precepts of the Fourteenth Amendment by not permitting cross examination and in using hearsay ex-parte statements.

The pertinent provisions of the By-Laws referred to, provide in part:

ARTICLE VIII, Section 5:

- h. The Executive Committee, when its action has prompted the hearing, shall appoint one of its members or some other Medical Staff member to represent it at the hearing, to present the facts in support of its adverse recommendation, and to examine witnesses. It shall be the

obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision.

- i. The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness on any matter relevant to the issue of the hearing, to challenge any witness and to rebut any evidence . . . (emphasis supplied) J.A. p. 411, 412

While the defendant's By-Laws recognize the procedural due process concepts set forth in *Goldberg* requiring the presentation of witnesses in a factual context, as presented here, the rights of confrontation and cross examination were denied to plaintiff. The defendant denied the plaintiff the procedural safeguards of its By-Laws, Rules and Regulations and of the Fourteenth Amendment. The defendant cannot exclude the plaintiff from the practice of his profession or adversely affect his property rights to his license by imposing a stigma as they did in a manner that contravenes the due process or equal protection clause of the Fourteenth Amendment. See *Willner vs. Committee on Character & Fitness supra* 102; *Schware vs. Board of Bar Examiners supra* 238, 239. The hearing provided the plaintiff by the defendant, was one of mere form, not substance. It was not meaningful and was constitutionally inadequate. The defendant did not produce witnesses. The defendant appointed Robert Kerin, M.D., as its petitioner's representative, who read letters or notes of telephone conversations which constituted the sole and exclusive evidence adduced at the hearing. J.A. p. 339. The plaintiff was required to admit, deny or explain the letters previously undisclosed to him. J.A. p. 11-

18, 388-400. The truth of the ex-parte letters or notes of telephone conversations was assumed. The hearing did not comport with the minimal requirements of due process. In *Willner*, the U.S. Supreme Court condemned the use of ex-parte statements and stated, "We have emphasized in recent years, that the procedural due process often requires confrontation and cross examination of those whose words deprive a person of his livelihood," *Willner vs. Committee on Character & Fitness supra* 103. In reviewing state action in this area, as in all others, the Court must look to substance, not to mere form to determine whether constitutional minimums have been honored. *Willner vs. Committee on Character & Fitness supra* 106, 107, (concurring opinion Goldberg, J.)

The decision to grant or deny the plaintiff's hospital staff privileges must be based solely on the evidence adduced at the hearing. See *Escalera vs. New York City Housing Authority* 425 F.2d 853 (2nd Cir. 1970). Denying the plaintiff the opportunity to confront and cross examine persons who supplied information, upon which the adverse recommendation to deny him hospital staff privileges was based, was improper. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses. *Escalera vs. New York City Housing Authority supra* 862. This Court's decision in *Escalera* is strikingly similar to the facts and circumstances of the instant case. The minimum due process requirements of the Fourteenth Amendment as established in that case were denied plaintiff by the defendant.

The use of ex-parte statements has been held constitutionally insufficient to meet the minimum due pro-

cess requirements in a factual context as present here. The right of cross-examination and confrontation are the minimum requirements of due process. See *Ricucci vs. United States*, 425 F. 2d 1252 (1970); *Thomas vs. Ward*, 374 F. Supp. 206 (M.D. N.C., 1973).

The plaintiff's license and "liberty right" to practice his profession are substantial "rights" entitled to the protection of the Fourteenth Amendment. Such protection demands the plaintiff have the right to confront and cross examine any person who furnishes any evidence or information that was used by the defendant resulting in the denial of hospital staff privileges.

All evidence upon which the decision to deny the plaintiff hospital staff privileges was based, was hearsay in its rankest form. The evidence consisted of ex-parte letters, transcripts of telephone conversations, and other information of similar nature. No probability of trustworthiness clung to the hearsay information. The due process clause requires that the four reasons assigned for the denial be proved by objective criteria and underlying facts. The subjective opinions and the hearsay information were insufficient upon which to base the serious and grievous blow dealt the plaintiff in the denial of staff privileges. The hearsay information was inadequate for the ultimate determination made. See *National Council, etc. vs. Subversive Activities Cont. Board* 322 F.2d 375, 386, 387 (Dist. Col. Circuit 1963). The rights of cross examination and confrontation permit the tribunal making the ultimate decision to pass its decision on objective facts and not subjective uncorroborated, hearsay evidence.

The hearing afforded the plaintiff was constitutionally insufficient for another reason. A conflict of

interest existed between Robert Kerin, M.D. the petitioner's representative who presented the Medical Staff case regarding Dr. Schlein and Peter Naiman, M.D. who sat in a quasi-judicial capacity as a member of the Ad Hoc Committee. J.A. p. 209, 210, 302, 308, 339. These two doctors are medical partners and were the only other orthopedic surgeons holding full privileges at the defendant. J.A. p. 260. Dr. Naiman was also a witness at the Credentials Committee hearing of June 22, 1973. J.A. p. 302, 308. Tribunals which combine functions of prosecutor and judge into one body do not meet due process requirements of basic fairness within the meaning of the Fourteenth Amendment of the United States Constitution. See *Hoberman vs. Lock Haven Hospital supra* 1186. If the functions of investigating, prosecuting and judging have been combined in a single person, a fair hearing will be presumed to be unavailable and actual bias need not be sought. *Citta vs. Delaware Valley Hospital* 313 F. Supp. 301, 310, 311 (E.D. Pa.) Dr. Kerin disqualified himself in an earlier committee hearing from voting on the application of Dr. Schlein due to the conflict of interest arising out of the fact that his partner Dr. Naiman, had previously testified on the application on June 22, 1973, and secondly, he was in the same field, orthopedic surgery, as Dr. Schlein. J.A. p. 308.

The Ad Hoc Committee upheld the Medical Staff recommendation to deny plaintiff privileges for the reasons assigned. The plaintiff appealed the denial to the Appellate Review Committee pursuant to the Medical Staff By-Laws. J.A. p. 414-416. The District Court characterized the hearing before the Appellate Review Committee as de novo. The Medical Staff By-Laws, Article VIII, Section 8(f) provide that the Appellate Review shall be limited to the record and shall consider written statements submitted by the

plaintiff. The constitutional infirmities and inadequacies of the hearing before the Ad Hoc Committee, as discussed herein, were adopted and ratified by the Appellate Review Committee. The Appellate Review does not provide for cross examination, confrontation and its hearing is limited to the record of the Ad Hoc hearing. J.A. p. 414, 415. The hearing afforded Plaintiff was Constitutionally inadequate, was one of form, not of substance and not meaningful within the meaning of the Fourteenth Amendment of the United States Constitution.

ARGUMENT III

THE COURT ERRED IN FINDING THAT THE DECISION OF THE DEFENDANT TO DENY PLAINTIFF HOSPITAL STAFF PRIVILEGES WAS NOT ARBITRARY, CAPRICIOUS OR DISCRIMINATORY.

The denial of the plaintiff's application for hospital staff privileges violated the substantive due process mandates of the Fourteenth Amendment to the United States Constitution in that the same was arbitrary, capricious, discriminatory, and not based upon appropriate or substantial evidence. The protection of the individual against arbitrary action is the very essence of due process. *Slochower vs. Board of Education* 350 U.S. 551, 559. "Employment is one of the greatest, if not the greatest benefit that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness; our

protection against arbitrary, capricious and unreasonable government action and it is also liberty-liberty to work- which is the very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment. *Board of Regents vs. Roth supra dissent* 588, 589. A state cannot exclude a person from the practice of his occupation in a manner or for reasons that contravene the due process and equal protection clause of the Fourteenth Amendment a state cannot exclude an applicant when there is no basis for their findings that he fails to meet the standards, or when their action is invidiously discriminatory. *Schwartz vs. Board of Examiners supra* 238, 239.

The decision resulting from the hearing must be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness and unreasonableness. *Woodbury vs. McKenna* 447 F.2d 839, 842 (5th Cir. 1971).

The four reasons assigned for the denial of the plaintiff's application involved two substantial interests of the plaintiff, "reputation and the ability to pursue a profession effectively. Both are ordinarily accorded meticulous protection, by the libel laws and the latter, in part, by rules designed to prevent direct injury by arbitrary state action." See *Birnbaum vs. Trussell supra* 678, 679, Fn. 13. After extensive discovery, which included depositions, interrogatories, and requests for admissions of fact, the assigned reasons could not be supported by fact or by the record. The reasons assigned when the defendant moved for summary judgment were altered to "inability to get along with other members of the hospital staff." The allegation that the plaintiff's professional

reputation was essentially negative was abandoned; the allegations as to substantial doubts that he possessed the demonstrated competence and good reputation was abandoned. J.A. p. 61, 267, 268. The affidavit of the hospital administrator, George Plaskowitz, filed in support of the Motion for Summary Judgment accords weight to certain letters and disregards others on the basis that they were solicited by plaintiff's counsel or they were elicited from persons who did not work directly with the plaintiff in orthopedics. J.A. p. 107, 109. What is more arbitrary and capricious than to assign and evaluate weight given to certain letters at certain times to suit one's own ends particularly when the final reason for the denial is inability to work in an harmonious relationship with other hospital staff members. The letters disregarded were from hospital administrators, physicians, nurses and other hospital staff personnel at Park City Hospital. J.A. p. 306, 322, 335, 336, 337, 342, 354, 383. The acts of the defendant in denying plaintiff hospital staff privileges is arbitrary, capricious and without evidence. For whatever reason, the plaintiff is not welcome at the defendant hospital as a member of its staff.

In *Rosner vs. Eden Township Hospital District* 58 Cal. 2d 592, 24 Cal. Rptr. 551, a hospital board's denial of staff privileges to a doctor, on the basis of his ability to get along with others was reversed. The Court, at page 551, said:

The fact that a doctor, due to criticisms made by him relating to treatment of patients or hospital practices, has been "unable to get along with" some doctors or hospital personnel is not a sufficient ground to exclude him from the use of hospitals. Obviously physicians will not always

agree as to the proper treatment for a patient or as to the proper practices in a hospital. The goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed. Considerations of harmony in the hospital must give way where the welfare of patients is involved, and a physician by making his objections known, whether or not tactfully done, should not be required to risk his right to practice medicine.

Moreover, a hospital district should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction, and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present. (emphasis added)

The standard used by the defendant of behavior, and inability to get along with others is too vague, ambiguous and capable of arbitrary application. It is inadequate to meet the due process requirements of

the Federal Constitution. The standard of inability to get along with others has been held to be constitutionally insufficient. *Rosner vs. Eden Township Hospital District*, 58 Cal. 2d 592, 25 Cal. Rptr. 551, 375 P.2d 431 (1962); *Martino vs Concord Community Hospital District* 223, Cal. App. 2d 51, 43 Cal. Rptr. 255 (1965); *Wyatt vs. Tahoe Forest Hospital District* 174 Cal. App. 2d 709, 345 P.2d 93 (1959). Physicians will not always agree as to the proper treatment for patients or as to the proper practices in a hospital. Physicians retain their First Amendment rights of freedom of speech to criticize and to speak out. To stifle the freedom of speech under the guise of inability to get along with others, in fact, is nothing more than a subterfuge having no relevance to fitness.

It is obvious that the danger of applying the criteria of inability to get along with others is being applied as a subterfuge by the defendant and, in fact, has no validity as to considerations as to Dr. Schlein's competence or fitness to hold hospital staff privileges. The record of the proceedings before the hospital and the disclosure by motion and deposition demonstrate that the four reasons for the plaintiff's denial of hospital staff privileges lack a factual basis and was predicated upon insufficient substantive grounds and therefore, arbitrary, capricious and in violation of the Fourteenth Amendment of the United States Constitution. J.A. p. 176, 177, 187, 189, 190, 215, 219, 262, 263, 267-271. The only appropriate and factual evidence before the defendant was the plaintiff's testimony. The defendant relied upon an ex-parte letter from Dr. Irwin Siegal. Dr. Siegal is a member of the Strauss Medical Group who employed the plaintiff. Their relationship was one of employer-

employee and did not involve to that extent a hospital staff relationship. To the extent that Dr. Siegal and Dr. Schlein worked together, Dr. Siegal testified that Dr. Schlein and he worked well together. J.A. p. 229, 230. Dr. Schlein at the Ad Hoc hearing on January 3, 1974, when asked to explain Dr. Siegal's letter, said as follows:

"I was left with Doctor Topouzian for a year, and then Doctor Siegal came back. At that time, I was very unhappy with their treatment of me. I told Doctor Kerin that when I went there, they told me the salary was low but, however, because I was greatly interested in research, they told me that I could have any tools available to me that I desired. This is where all and everything was going.

. . . They never supplied me with a single research instrument. The only instrument from my surgery that they ever bought for me was a single bone knife.

. . . During this period of time while we were there, I felt Doctor Nathan and I were very productive in our work. We published two papers and gave a talk together. We also, I believe, took care of an awful lot of patients.

. . . Well, I finally couldn't tolerate some of their treatment of me and I was verbal about it, but I really believe that I had been taken gross advantage of. I then left the group, leaving them with Doctor Siegal, Doctor Topouzian, and Doctor Fred Nathan. Ad Hoc Transcript pages 47-48. (emphasis supplied)

Dr. Schlein's legitimate complaints were an exercise of his First Amendment right of freedom of speech. The First Amendment protects freedom of speech and vocal dissatisfaction in the employer-employee relationship is impermissible grounds for the denial of hospital staff privileges. See *Pickering vs. Board of Education* 391 U.S. 563 (1968), 88 S.Ct. 1731; *Mabey vs. Regan* 537 F.2d 1036. Dr. Schlein's objections were to personal disappointments arising out of an employment relationship as it frustrated his ability to pursue medical research. For the defendant to deny the plaintiff hospital staff privileges on the basis of verbal objections arising out of an employment relationship, unrelated to harmony and cooperativeness within the framework of a hospital setting, is arbitrary and capricious in violation of the plaintiff's First and Fourteenth Amendment rights. To reiterate, Dr. Siegal testified that he worked well with Dr. Schlein, which is the only proper criteria. The grave danger referred to in *Rosner* that temperamental suitability would be used as a subterfuge is present and has become a reality.

The objective fact demonstrated by review of the depositions substantiates that Dr. Schlein worked smoothly and well with other physicians and hospital staff members. He worked well with Dr. Siegal. J.A. p. 230. Dr. Siegal testified and also wrote a letter indicating that the record of the Strauss Clinic and Weiss Memorial Hospital did not indicate that there was any record of any complaints by nurses, patients, or other hospital staff members against Dr. Schlein, J.A. p. 230, 231, 383.

Letters from the administrators of Weiss Memorial Hospital and Park City Hospital state the plaintiff fulfilled his obligations and duties as a member of

the hospital staff well. J.A. p. 322, 342. Dr. Coventry of Mayo Clinic recommended Dr. Schlein for privileges. J.A. p. 316, 364.

At these institutions, he had a good reputation, was deemed competent and demonstrated concern for his patients. See depositions of Irwin Siegal, M.D. J.A. p. 230, John A. Elstrom, M.D., J.A. p. 250-258; and Asok Ray, M.D. J.A. p. 243-249. Indeed, the baseless allegation of inability to work well with others, the final alleged ground for denial of his privileges is repudiated by the foregoing depositions and the letters on file with the defendant, which encompass the plaintiff's entire medical career in hospital staff situations. There did not exist any evidence of inability to work well with others in hospital staff situations.

The defendant, before denying hospital staff privileges, has a duty to conduct a fair investigation. It did not.

Dr. Nicholas Coassin, one of the three members of the Credentials Committee, testified in his deposition that no investigation was made as to any complaints at the Mayo Clinic or particular problems with patients, J.A. p. 262; no attempt was made by members of the Credentials Committee to determine whether any factual basis existed for the four reasons of denial, J.A. p. 263-264, 268; that no investigation was made to determine the reason for Dr. Camarda's letter J.A. p. 263; it was the duty of the Credentials Committee to investigate and determine the facts concerning the applicant and it was not done. J.A. p. 262, 264; that he had no knowledge of any abrasive behavior on the part of the plaintiff which resulted in denial of privileges, J.A. p. 271; that he was not denied privileges because of competency or clinical

judgment, J.A. p. 267-269; that the Credentials Committee accepted the recommendation of Dr. Coventry; that there was no factual investigation as to any patient complaints or difficulty with colleagues at Weiss Memorial Hospital and Mayo Clinic; or the facts underlying any letters, J.A. p. 276; Daniel Johnson, Vice President of the Board of Directors of defendant and Chairman of the Appellate Review Committee testified that the Board did not exercise independent judgment in passing upon the application of Dr. Schlein, J.A. p. 279, 280, 281. He testified that the Board did not know the facts upon which Dr. Schlein was denied privileges and testified as follows:

"Finally we followed the recommendation because, after that period of time it became quite clear that for whatever basic reasons, I don't know what it was that Dr. Schlein unfortunately was unacceptable to this group. So in searching my own mind, I have nothing personal against Dr. Schlein at all." J.A. p. 284 (emphasis supplied)

The decision, which resulted in the denial of hospital staff privileges to the plaintiff, has been tainted by irrelevant considerations i.e., association with Dr. Lewis and of freedom of speech, as previously discussed. The decision is unsupported by appropriate evidence, i.e., hearsay and ex-parte statements. The decision was arbitrary, capricious, and unreasonable. The reasoning of the defendant in denying plaintiff's application took on an Alice-in-Wonderland quality wherein the divorce between fantasy and fact cries out from the record. The fantasy is that defendant claims to have given plaintiff due process. The fact is plaintiff has been denied due process.

To deny the plaintiff hospital staff privileges for the alleged reason of inability to get along with others is too vague and ambiguous and is lacking in objective criteria permitting definition. It permitted the defendant to deny plaintiff's application in an arbitrary and discriminatory manner. Inherent in permitting the defendant to deny plaintiff privileges for such reasons is the grave danger that such reasons will be used as a subterfuge as present in this case, without relevance to his fitness for hospital staff privileges.

Whenever a hospital appoints a group of its doctors to a "credentials committee" and empowers them to supervise the competence of other doctors, there is a grave danger that the members of the committee will seek to exclude doctors because they are competitors, because they are Black, or Jewish, or Haole or Oriental, because they have testified against them in malpractice suits, or simply because they do not like them. Requiring a credentials committee to act out a charade of seemingly fair procedures does little to minimize the danger that the committee will draw its conclusion for reasons not present in the record and that danger exists regardless of where the burden of proof is allocated. See *Silver vs. Castle Memorial Hospital* 497 P.2d 564, dissent page 573.

The foregoing observations are appropriate in the instant case. Dr. Schlein would be a competitor of Dr. Kerin and Dr. Naiman. The charade of giving Dr. Schlein due process was acted out. The proceedings were orchestrated by Dr. Kerin, Chairman of the Credentials Committee. Reasons were assigned which impugned the plaintiff's professional reputation, competency and of patient relationships. Subsequently, at the twelfth hour, a vague and indefinable reason

of inability to work with others was substituted. The defendant by its arbitrary and capricious acts have inflicted a grievous injury to plaintiff's professional reputation and his right to pursue his chosen occupation and fully exercise the entitlement of his state medical license.

Even in applying permissible standards, the defendant cannot exclude the plaintiff when there is no basis for their finding that he fails to meet their standards or where, as here, there are no facts in evidence or when their action is invidiously discriminatory. See *Schwartz v. Board of Bar Examiners, supra*, 239. There are no facts or evidence to suggest that Dr. Schlein engaged in any conduct which adversely affected his ability to work well with other hospital staff members, as alleged.

The defendant's denial of hospital staff privileges to the plaintiff was not based upon appropriate or substantial evidence. It was based upon an arbitrary and capricious standard, "inability to get along with others". It was tainted with irrelevant and immaterial considerations, all in violation of the plaintiff's First Amendment right of freedom of speech and association and in violation of his Fourteenth Amendment right of due process.

ARGUMENT IV

THE DEFENDANT APPELLEE HOSPITAL'S CONDUCT CONSTITUTES "STATE ACTION" AND THE COURT HAS JURISDICTION UNDER TITLE 42 U.S.C. SEC. 1983.

The plaintiff commenced the instant action alleging jurisdiction of the Court in 28 U.S.C. Sec. 1343 and seeking injunctive and monetary relief pursuant to 42 U.S.C. Sec. 1983 and 1985. The Court below found jurisdiction under 42 U.S.C. Sec. 1983 and 1985 and 28 U.S.C. Sec. 1343. The defendant moved to dismiss plaintiff's complaint for lack of jurisdiction of the Court. The lower Court denied defendant's Motion to Dismiss. *Schlein Vs. Milford Hospital* 383 F. Supp. 1263 (D. Conn. 1974). J.A. p. 50-60. The essential finding was that:

"In this case, however, a private hospital, by virtue of its state licensing, has been given the authority to determine important aspects of the scope of the license required of a physician. State authorized power is being used to determine the scope of state created rights. Moreover, this is occurring in the context of a geographic monopoly that underscores both the significance of the hospital's power and the impact upon the physician's rights."

The defendant hospital filed a cross appeal on the issue of jurisdiction. The lower Court in deciding the issues on the defendant's Motion for Summary Judgment, again sustained jurisdiction adhering to its ruling on the Motion to Dismiss. J.A. p. 167-173.

"The State of Connecticut has so far insinuated itself into a position of interdependence with the defendant that it is a joint participant in the challenged activities, which, in that account cannot be considered to be "purely private" as to fall without the scope of the Fourteenth Amendment." *Burton Vs. Willmington Parking Authority*, 365 U.S. 715, 725; *Moose Lodge No. 107 Vs. Ivis*, 407 U.S. 163, 172, 173.

"Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." *Burton Vs. Willmington Parking Authority, supra*, 722; *Moose Lodge No. 107 Vs. Irvis, supra*, 172.

The State of Connecticut requires that the plaintiff-physician be licensed to practice medicine and perform surgery in accordance with *Conn. Gen. Stat. Sec. 20-8 et seq.* Connecticut, likewise, requires hospitals to be licensed. *Conn. Gen. Stat. Sec. 19-33 et seq.*¹ The defendant hospital enjoys a monopoly within the City of Milford as before any other hospital can be built in Milford, it would be necessary to secure approval from the Commission on Hospitals and Health Care. See *Section 19-73(a) et seq., Conn. Gen. Stat., Revision of 1958; Section 19-276 et seq. Conn. Gen. Stat.* Among factors to be considered in issuing the license is "the demonstrable need for such institutions." J.A. p. 72, 89-90. *Conn. Gen. Stat. Sec. 19-36*². The defendant is also subject to extensive and intrusive state regulations. *Conn. Gen. Stat. Sec. 19-73(a), et seq. Connecticut Public Health Code 19-13(d) (3) et seq.* While plaintiff's state license granted pursuant to *Section 20-8 et seq. Conn. Gen. Stat.* permits him to practice medicine and his specialty of orthopedic surgery anywhere in the State, the nature of his profession and of his specialty of orthopedic surgery requires that he enjoy staff privileges at a hospital in order to deliver the full range of service that he is licensed to perform. By deciding whether to extend staff privileges to the plaintiff, the defendant hospital, by virtue of its state license, determines important aspects of the scope of his license and any other physician's license. In the instant case, this determina-

1. Now *Section 19-576, et seq. Conn. Gen. Stat.*
 2. Now *Section 19-578 Conn. Gen. Stat.*

tion has substantive and geographic implications. Moreover, the denial of hospital staff privileges may seriously damage a physician's "standing and associations" in his professional community, particularly for the four reasons stated for the denial of the plaintiff's privileges. *Board of Regents Vs. Roth*, 408 U.S. 564, 573; *Goss Vs. Lopez* 419 U.S. 565; *Birnbaum Vs. Trussell* 371 F. 2d 672, 677. To the extent that the plaintiff's Milford patients require treatment at a hospital, the denial of staff privileges at the only licensed hospital in the area limits the geographic scope of his license. J.A. p. 88, 89, 286, 287, 288. See *Foster vs. Mobile County Hospital Board*, 397 F. 2d 227 (5th Cir. 1968). The state, in licensing the defendant and in granting it a geographical monopoly, has delegated and authorized the use of state power to determine the scope of state-created rights of the plaintiff's license to practice his profession. A state protected monopoly status is highly relevant in assessing the aggregate weight of a private entity's ties to the state. *Jackson vs. Metropolitan Edison Co.*, 419 U.S. 345, 361 (dissent, Douglas, J.).

The defendant, to be licensed under Connecticut General Statutes, must comply with Sections 19-13 (D) (2) through 19-13 (D) (12) inclusive of the *Connecticut Public Health Code* which requires the defendant to adopt medical staff by-laws and procedures for the selection of physicians for hospital staff privileges. J.A. p. 71, 72, 89. The defendant hospital has complied with the foregoing *Connecticut Public Health Code* requirements. See *deposition of George Plaskowitz, Administrator, Milford Hospital*, pages 15 - 19, J.A. p. 285. The plaintiff's application for hospital staff privileges at the defendant hospital was acted upon and his denial arose out of the By-Laws so adopted, pursuant to state statute and the State Health Code.

The acts of the defendant constitute "state action" for the reason that it is a partner with the state. The State of Connecticut and all non-profit hospitals licensed by the State entered into a partnership by legislative enactment. Health care in Connecticut has become a public function. *Conn. Gen. Stat. Sec. 19-73 (a), et seq.*

Section 19-73(a), Conn. Gen. Stat., entitled, "Commission on Hospitals and Health Care", provides in part:

"The General Assembly finds that mutual interests of the state and the administrators and trustees of health care institutions and facilities within the state for the provisions of health care to their citizens and the control of the cost of such health care creates a need for a partnership to provide for effective promotion of such interest and the necessity in the public interest for the provisions hereinafter enacted as declared as a matter of legislative determination." (emphasis supplied).

The Connecticut Legislature, by creating a partnership between the State, the defendant, and others similarly situated, and further declaring health care a public function is conclusive in determining that the acts of the defendant hospital are "under color of state law", for the simple reason Connecticut has willed it that way.

The language creating the partnership and declaring health care a public necessity and function by the legislature is unequivocal and explicit. A quotation from *Powe Vs. Miles*, 407 F. 2nd 73, 83, is appropriate, "We see no reason why the state should not be taken at its word." The act of one partner denying plaintiff hospital staff privileges is the act of

the other partner, the State. The acts of denying the plaintiff hospital staff privileges were "state action and under color of state law".

In determining whether state action exists, the power of eminent domain is significant. See *Male Vs. Crossroads Associates*, 469 F. 2d 616, 617 (2nd Cir. 1972); *Eaton Vs. Grubbs*, 329 F. 2d 710, (4th Cir. 1964).

The defendant and other non-profit hospitals possess the right of eminent domain by virtue of Section 19-73t Conn. Gen. Stat., which provides in part:

"A nonprofit hospital, licensed by the state department of health, which provides lodging, care and treatment to members of the public, and which wishes to enlarge its public facilities by adding contiguous land and buildings thereon, if any, the title to which it cannot otherwise acquire, may prefer a complaint for the right to take such land to the superior court for the county or judicial district in which such land is located, provided such hospital shall have received the approval of the commission on hospitals and health care under section 19-73m to 19-73o Land so taken shall be held by such hospital and used only for the public purpose stated in its complaint. . . ." (emphasis supplied)

The clear import of the statutory language is that hospitals are public facilities used for public purposes. The right of eminent domain has long been recognized as an exercise of a police power of the state for a public use. See *Adams Vs. Greenwich Water Co.* 138 Conn. 205. The defendant is serving a public purpose in partnership with the state and possesses the right to exercise sovereign and police powers of the state.

In determining whether or not there is state action to subject otherwise private activity to the mandates of the Fourteenth Amendment, the aggregate is controlling. The underlying analysis of the weighing and sifting of the facts and circumstances must be cumulative rather than sequential. Such an analysis, in the instant case, mandates a finding that state action is present.

Courts, in sifting and weighing circumstances in "state action" cases, have found the following to be of importance and controlling: Whether the state has so far insinuated itself into a position of interdependence that it must be recognized as a joint participant in the challenged activity. *Burton Vs. Willmington Parking Authority*, *supra* 725; The regulations involved and their extent; *Moose Lodge No. 107 Vs. Irvis*, *supra* 163; *Male Vs. Crossroads Associates*, 496 F. 2d 616 (2nd Cir. 1972). The powers of eminent domain; *Eaton vs. Grubbs*, 329 F. 2d 710 (4th Cir. 1964); *Male vs. Crossroads Associates*, *supra*; the receipt of Hill-Burton funds; *Simkins vs. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963); *Sams vs. Ohio Valley General Hospital Association* 413 F. 2d 826 (4th Cir. 1969). The tax exempt status of the private person. *Jackson vs. The Statler Foundation* 496 F. 2d 623 (2nd Cir. 1974).

The State of Connecticut has adopted a state-wide plan pursuant to the *Hill-Burton Act* and the defendant has received substantial funds under that program. 42 U.S.C. §291, *et seq.* J.A. p. 72. See *Simkins vs. Moses H. Cone Memorial Hospital*, *supra*, for an analysis of the extensiveness of the federal regulations as it pertains to states and participating hospitals receiving *Hill-Burton* funds. In addition to being subject to the

regulations under the *Hill-Burton Act*, the defendant hospital is subject to review under the *Professional Standards Review Organization (PSRO)*. Pub. L. No. 92-603, Title II, Sec. 249 F.B., 86 Stat. 1437. J.A. p. 72. The operation and existence of the defendant is governed by a phalanx of state and federal regulations and laws. J.A. p. 89, 90, 285-292.

Sams vs. Ohio Valley General Hospital Association, supra 828, a case not involving racial considerations, held that "Substantial federal moneys invited and flowing into the defendant hospitals under the *Hill-Burton Act* entail, in return, obligations of observance of Federal constitutional mandates. Disregard of them is State action. . . ."

The plaintiff recognizes that the receipt of *Hill-Burton* funds, standing alone, has been held in this circuit, not to constitute state action; however, the receipt of such funds is not without significance and is part of the aggregate of the relationship between the state, federal government, and the defendant. The Court, in *Simkins*, in discussing the legislative history of the *Hill-Burton Act*, stated at page 968.

"It shows, rather a congressional design to induce the States, upon joining the program, to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it "is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the . . . (institution actually chooses) would otherwise be private: the equal protection guarantee applies." (emphasis supplied)

The finding of state action in *Sams, supra*, has been adopted in other cases. *Simkins vs. Moses H. Cone Memorial Hospital, supra*; *Cypress vs. Newport News General & Non-Sectarian Hospital Association* 375 F.2d 648 (4th Cir. 1966); *Eaton vs. Grubbs, supra*; *Bricker vs. Sceva Speare Memorial Hospital* 339 F. Supp. 234 (D.C. N.H. 1972); *Taylor vs. St. Vincent's Hospital* 369 F. Supp. 948 (9th Cir. 1975), *aff'd* 523 F. 2d 75, *cert. den.* 424 U.S. 948; *Citta vs. Delaware Valley Hospital* 313 F. Supp. 301 (E.D. Pa. 1970).

The defendant is a non-profit hospital and has tax exemptions from the City of Milford, State of Connecticut and the Federal Government. J.A. p. 45-47, 90, 288, 289. Its tax exempt status is relevant in determining "state action." "Organizations must apply for exempt status. Moreover, the acts of application and approval and tax exempt status are not value neutral. In effect, the government would appear to be certifying that every foundation on its tax-exempt list is laboring in the public interest." *Jackson vs. The Statler Foundation, supra* 633; footnote 17, page 634. The defendant is not the private club as in *Moose Lodge*, but is open to all members of the public and is serving a public function as decreed by the State of Connecticut. The defendant is clearly subject to the mandates of the Fourteenth Amendment as *Eagle Restaurant* was in *Burton Vs. Willmington Parking Authority* 365 U.S. 715.

The State of Connecticut and the defendant hospital have more than a symbolic relationship. They are partners engaged in a joint enterprise fulfilling a public function, health care. The state licensing of the defendant hospital and the power granted it, by virtue of its license, to determine the scope of Dr.

Schlein's license, is of itself, a single pervasive fact constituting state action.

Further, the defendant hospital is subject to extensive and intrusive regulations under the *Hill-Burton Act*, the provisions of the *PSRO*, the State licensing regulations, and the *Connecticut Public Health Code*, all of which have caused the State and/or the Federal Government to have insinuated itself into a relationship of interdependence with the defendant far beyond the pale of a symbolic relationship. The foregoing, taken with the tax-exempt status of the defendant and the power of eminent domain granted to non-profit hospitals, mandates that the otherwise private acts of the defendant are acts of the State "under color of state law" and thereby subject to the precepts of the Fourteenth Amendment.

CONCLUSION

A. The District Court was in error in granting defendant's Motion for Summary Judgment as genuine issues of material fact exist and the order of the Court granting the same should be reversed and the case remanded for all purposes.

B. The defendant has a property and liberty right to be protected and was denied procedural due process.

C. The decision of the defendant was arbitrary, capricious and discriminatory and not based upon substantial or appropriate evidence.

D. The acts of the defendant in denying plaintiff hospital staff privileges "were under color of state law" and the court has jurisdiction. The acts of the defendant in denying plaintiff hospital staff privileges were subject to the limitations of the Fourteenth Amendment of the United States Constitution.

RESPECTFULLY SUBMITTED,
ALLEN P. SCHLEIN, M.D.
PLAINTIFF -APPELLANT
BY BENNETT, KAPUSTA &
COUGHLIN

John J. Coughlin, for the firm
75 Broad Street
Milford, Connecticut

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT .

ALLEN P. SCHLEIN, M.D.,

Plaintiff-Appellant

VS.

THE MILFORD HOSPITAL, INC.,

Defendant-Appellee

*
*
*
*
*
*
*
*

DOCKET NO. 77-7021

CERTIFICATION OF SERVICE

The undersigned hereby certifies that he served the within Amended Brief of Appellant upon Stephen E. Ronai, Esq., 81 Broad Street, Milford, CT 06460, counsel for the appellee by depositing a true copy of the same, which was mailed in a postage paid and properly addressed envelope to the address of the attorney and by depositing the same in an official depository under the exclusive care and custody of the United States Post Office within the State of Connecticut.

ALLEN P. SCHLEIN
PLAINTIFF-APPELLANT
BENNETT, KAPUSTA & COUGHLIN
BY: *Joseph Coughlin*

BENNETT, KAPUSTA
& COUGHLIN
ATTORNEYS AT LAW
75 BROAD STREET
MILFORD, CONN. 06460

(203) 874-6773

JURIS NUMBER
03287